Supreme Court, U.S.
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No.

In the Supreme Court of the United States

KIRK BENOIT, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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September 8, 2010

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QUESTIONS PRESENTED

Petitioners, African-American farmers, sought judicial review of Respondents' denial of their administrative claims, pursuant to an extraordinary statute (§ 741) which created a special administrative procedure and authorized de novo judicial review of agency determinations. The district court granted summary judgment for Respondents, and the court of appeals affirmed, on the ground that Petitioners had failed to exhaust all administrative remedies.

The following questions are presented:

1. Did the lower courts err in applying discretionary doctrines of "finality" and "exhaustion of remedies" to limit judicial review of agency action when the applicable statute plainly has no such requirements, the doctrines would impede the statute's directive for expeditious "de novo" judicial review, and the purposes of the "exhaustion of remedies" and "finality" doctrines are not served?

2. Did the lower courts' holding that Petitioners were required to have sought further administrative remedies conflict with this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992)(excessive agency delay as prejudice negating exhaustion requirement), when Respondents took more than three and as many as five years to deny Petitioners' decades-old claims, under a statute that mandated agency action within 180 days "to the maximum extent practicable"?

PARTIES TO THE PROCEEDING

Petitioners in this matter include: 1) Kirk Benoit of St. Croix, U.S. Virgin Islands; 2) Eddie Cotton, Jr. of Pattison, Mississippi; 3) Dorothy Deloney of Ashdown, Arkansas; 4) Hezekiah Gibson of Manning, South Carolina; 5) Charles Harris and Ruth Harris of Brundidge, Alabama; 6) Alphonso James and Mariet James of St. Croix, U.S. Virgin Islands; 7) Bruce Manigo of Charleston, South Carolina; 8) Donnell Manigo of Walterboro, South Carolina; 9) Randolph Manigo of Walterboro, South Carolina; 10) and 11) John Simmons of Williston, South Carolina.[1]

Respondents in this matter include: 1) United States Department of Agriculture; 2) Farm Services Agency; and 3) Edward Schafer, Secretary of the United States Department of Agriculture (substituted by United States District Court for the District of Columbia for Anne Veneman, former Secretary named in Second Amended Complaint, pursuant to Rule 25(d) of Federal Rules of Civil Procedure).

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[1] In addition to the 12 Petitioners, plaintiffs in district court also included two other African-American farmers, but these two had not received letters from USDA denying their claims. Their cases were ultimately resolved differently, and they are not Petitioners here.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

I. The Lower Courts Erred In Applying Discretionary Doctrines Of "Finality" And "Exhaustion Of Remedies" To Limit Judicial Review Of Agency Action When The Applicable Statute Plainly Has No Such Requirements, The Doctrines Impede The Statute's Directive For Expeditious "De Novo" Judicial Review, And The Purposes Of The "Exhaustion Of Remedies" And "Finality" Doctrines Are Not Served. 11

II. The Lower Courts' Holding That Petitioners Were Required To Have Sought Further Administrative Remedies Conflicts With

This Court's Decision in *McCarthy* When Respondents Took More Than Three And As Many As Five Years To Deny Petitioners' Decades Old Claims, Under A Statute That Mandated Agency Action Within 180 Days "To The Maximum Extent Practicable." . . 15

CONCLUSION 18

APPENDIX

Appendix A: Court of Appeals for the D.C. Circuit, Opinion and Judgment (June 11, 2010) 1a

Appendix B: District Court for D.C., Opinion and Order and Judgment (Sept. 9, 2008) 16a

Appendix C: Letter to Kirk Benoit from USDA 50a

TABLE OF AUTHORITIES

Cases

Aircraft & Diesel Equipment Corp. v. Hirsch,
331 U.S. 752 (1947) 16

Coit Independence Joint Venture v. FSLIC,
489 U.S. 561 (1989) 16

Colorado River Water Conservation Dist. v. United States,
424 U.S. 800 (1976) 15

Darby v. Cisneros,
509 U.S. 137 (1993) 14

Gibson v. Berryhill,
411 U.S. 564 (1973) 16

McCarthy v. Madigan,
503 U.S. 140 (1992) . . . . . *passim*

Patsy v. Board of Regents of Florida,
457 U.S. 496 (1982) 12

Pigford v. Glickman,
185 F.R.D. 82 (D.D.C. 1999) 12

Smith v. Illinois Bell Telephone Co.,
270 U.S. 587 (1926) 16

Walker v. Southern R. Co.,
385 U. S. 196 (1966) 16

West v. Bergland,
611 F.2d 710 (8th Cir. 1979) 16

Statutes

7 U.S.C. § 2279 [Section 741] ..... *passim*

15 U.S.C. § 1691 *et seq.* 4, 5

28 U.S.C. § 1254(1) 1

Pub. L. 105-277, § 101(a), [Title VII § 741] 5

Regulations

7 C.F.R. § 15f.9 7

7 C.F.R. § 15f.24 7

Other Authorities

144 Cong. Rec. S11433 13

144 Cong. Rec. S11434 13

Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team (Washington, D.C.; February 1997) ("CRAT Report") 11, 12, 17

United States Government Accounting Office Report: U.S. Department of Agriculture: Problems Continue to Hinder the Timely Processing of Discrimination Complaints, GAO-99-38 12

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review a decision of the United States Circuit Court for the District of Columbia, affirming the decision of the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia appears at Appendix 1a to the petition and is reported at 608 F.3d 17 (D.C. Cir. 2010).

The opinion of the United States District Court for the District of Columbia appears at Appendix 16a to the petition and is reported at 577 F. Supp. 2d 12 (D.D.C. 2008).

JURISDICTION

The district court, which had federal question jurisdiction over Petitioners' claims, in addition to jurisdiction pursuant to Section 741, entered its order and judgment dismissing the case on September 8, 2008. The court of appeals entered its order and judgment on June 11, 2010, affirming the district court's decision. The jurisdiction of this Court is invoked by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

7 U.S.C. § 2279, Section 741 states:

SEC. 741. WAIVER OF STATUTE OF LIMITATIONS.

(a) To the extent permitted by the Constitution, any civil action to obtain relief with respect to the discrimination alleged in an eligible complaint, if commenced not later than 2 years after the date of the enactment of this Act, shall not be barred by any statute of limitations.

(b) The complainant may, in lieu of filing a civil action, seek a determination on the merits of the eligible complaint by the Department of Agriculture if such complaint was filed not later than 2 years after the date of enactment of this Act. The Department of Agriculture shall—

(1) provide the complainant an opportunity for a hearing on the record before making that determination;

(2) award the complainant such relief as would be afforded under the applicable statute from which the eligible complaint arose notwithstanding any statute of limitations; and

(3) to the maximum extent practicable within 180 days after the date a determination of an eligible complaint

is sought under this subsection conduct an investigation, issue a written determination and propose a resolution in accordance with this subsection.

(c) Notwithstanding subsections (a) and (b), if an eligible claim is denied administratively, the claimant shall have at least 180 days to commence a cause of action in a Federal court of competent jurisdiction seeking a review of such denial.

(d) The United States Court of Federal Claims and the United States District Court shall have exclusive original jurisdiction over—

(1) any cause of action arising out of a complaint with respect to which this section waives the statute of limitations; and

(2) any civil action for judicial review of a determination in an administrative proceeding in the Department of Agriculture under this section.

(e) As used in this section, the term "eligible complaint" means a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996—

(1) in violation of the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) in administering—

(A) a farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account; or

(B) a housing program established under title V of the Housing Act of 1949; or

(2) in the administration of a commodity program or a disaster assistance program.

(f) This section shall apply in fiscal year 1999 and thereafter.

(g) The standard of review for judicial review of an agency action with respect to an eligible complaint is de novo review. Chapter 5 of title 5 of the United States Code shall apply with respect to an agency action under this section with respect to an eligible complaint, without regard to section 554(a)(1) of that title.

STATEMENT OF THE CASE

Petitioners are 12 African-American farmers whose farming operations suffered, including several who lost their land, because of racial discrimination and misconduct by USDA in the administration of loan and loan servicing programs, all in violation of the Equal

Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*, ("ECOA").

USDA's well documented record of race discrimination, which included years of delay, neglect and malfeasance, including mishandling, failing to respond to and "losing" complaints, led Congress in 1998 to enact extraordinary legislation re-opening the long-expired statute of limitations for ECOA claims that had been filed against USDA between 1981 and 1996. Pub. L. 105-277, § 101(a), [Title VII § 741], codified as "Waiver of Statute of Limitations," following 7 U.S.C. § 2279 [hereinafter referred to as "Section 741"]. The new law gave claimants two years to file a suit in federal court under § 741(a) or an administrative complaint with USDA under § 741(b).

All Petitioners sought administrative review under §741(b) between 1998 and 2000, filing complaints styled "Section 741 Complaint Request." USDA conducted investigations of the complaints which included taking sworn statements from Petitioners and agency officials. In 2003, 3-5 years after the complaints were filed, USDA sent each Petitioner a letter refusing to grant relief.[2]

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[2] The letters varied slightly in their wording. Petitioner Benoit's letter, attached in the appendix, for example said USDA "has reviewed your discrimination complaint. Our review was conducted pursuant to Section 741 . . . (Statute of Limitations Project). . . Based on our review, we have determined that your case is not appropriate for informal resolution because you were not qualified for the benefits, [sic] which you applied for. Petitioner James' letter said: USDA "has reviewed your discrimination complaint. Our review was conducted pursuant to Section 741 . . . (Statute of Limitations Project or SOL). . . On

Petitioners then filed this suit in the district court.

Section 741 provides, among other things, that the agency will "conduct an investigation, issue a written determination, and propose a resolution." "To the maximum extent practicable" these are to be done within 180 days. § 741(b)(3). In the process, the agency must "provide the complainant an opportunity for a hearing on the record before making that determination," § 741(b)(1), but there are no words requiring the complainant to request such a hearing.

Section 741(c) provides for judicial review if a claim is "denied administratively," and § 741(d) gives district courts jurisdiction for judicial review of "a determination in an administrative proceeding in the Department of Agriculture." Section 741(g) states that the "standard of review for judicial review of an agency action with respect to an eligible complaint is de novo review."

Neither the words "determination" nor "denied administratively" are modified or accompanied by the word "final."

In response to Petitioners' suit, Respondents moved for dismissal and summary judgment for failure to exhaust all available administrative remedies. The remedy that Respondents said should have been exhausted was created not by Section 741 but by

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February 10, 2003, your case was heard by a neutral party as part of [Civil Rights'] Alternative Dispute Resolution (ADR) Program for SOL. The parties were unable to reach a mutually satisfactory resolution of this matter."

regulations issued by USDA; it was an internal USDA appeal to be heard by an ALJ, which would have resulted in "final" agency action.[3]

Petitioners argued that the letters they received were "determinations" of their complaints subject to judicial review under the statute, but the district court held that argument "cannot be squared with the language and structure of the regulations." The district court agreed with Respondents' exhaustion argument, and granted summary judgment.

The court of appeals, after approving the district court's interpretation of the word "determination," turned its attention to the statutory word "denied." It too relied on the regulations, without any reference to the statute: "The Director's letter is not judicially reviewable because § 741(c) provides for judicial review only insofar as a claim is 'denied administratively.' The letter does not do that; it merely informs the complainant of the Director's decision not to negotiate a settlement. 7 C.F.R. § 15f.9."

The court of appeals continued, "a decision to deny a complaint can be issued only to a claimant who requested a formal hearing," and concluded that "in order to exhaust their administrative remedy, the [Petitioners] would have had to request a formal hearing before an ALJ."

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[3] The regulations provide that the ALJ's decision is final agency action, and that final agency action is judicially reviewable, 7 C.F.R. § 15f.24, but the regulations do *not* say a complainant must request an ALJ hearing as a prerequisite to judicial review nor that judicial review is *not* available for non-final agency actions.

The court of appeals considered the effect of this Court's recent decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992) on the exhaustion inquiry. The court acknowledged that *McCarthy* treated prejudice to claimants as a reason to reject an exhaustion requirement. However, the court of appeals did not acknowledge that under *McCarthy* delay in an administrative proceeding can constitute prejudice, and therefore the court of appeals did not consider whether the agency's 3-5 year delay in this case -- on complaints that were already as much as 20 years old and in the face of this statute mandating a 180-day target for agency action – was the kind of prejudice that should negate further exhaustion requirements, under general principles governing exhaustion of remedies and availability of judicial review.

This petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the courts below decided important questions of administrative law, involving the availability of judicial review and the doctrine of exhaustion of administrative remedies, in a way contrary to the applicable statute and contrary to this Court's rules set forth in *McCarthy v. Madigan*, 503 U.S. 140 (1992).

The relationship between agency action and judicial review is a recurring and significant issue in the administration of justice, particularly where, as here, the agency has a well documented history of misconduct. This Court has a critical role in overseeing that relationship to insure fidelity to law and consistent administration.

In this case, the courts below departed significantly from basic principles of exhaustion of administrative remedies and judicial review. By requiring Petitioners to exhaust administrative remedies beyond what was specified in the applicable statute (§ 741), the decision below conflicts with this important statute and with the principle that exhaustion is a creature of statute. Further, by requiring further delay in the face of a statutory mandate for expeditious agency action, the decision below conflicts with general principles of exhaustion of remedies set forth in *McCarthy v. Madigan*, which treated such delay as the type of prejudice that would bar an exhaustion requirement.

Petitioners here properly exhausted their administrative remedies by seeking and being denied relief. Respondents assert, and the courts below held, that Petitioners were required to go further within the agency, even though the agency had already taken 3-5 years to reach a decision that the statute itself said should come within 180 days, on claims many of which were already more than twenty years old.

The statutory mandate of 180 days has critical significance. Though the agency may not technically be in violation of the statute for taking longer because of the words "maximum extent practicable," nevertheless the expiration of 180 days after receipt by Respondents of a Section 741 Complaint implicates important statutory rights which the lower courts did not respect, and that affirms a complainant's option to end administrative review and seek judicial review.

The lower courts' acceptance of USDA's argument seriously disrupts the law of exhaustion of remedies in several ways:

1. First, it conflicts with the principle that exhaustion is a creature of statute, because section 741, the statute that creates the special administrative procedure and authorizes judicial review, plainly indicates that no further exhaustion is required following the denial letter the agency sent to Petitioners.

2. Second, even if there were ambiguity in section 741, requiring further exhaustion here conflicts with *McCarthy*, which recognized that extreme delay -- in this case the agency had already taken 6-10 times the 180 days allowed by Congress -- is the type of prejudice that obviates further exhaustion requirements.

3. Finally, the lower courts disrupted basic administrative law doctrine by allowing regulations to trump a conflicting statute, especially where the regulations did not say what the lower courts held--i.e., the regulations do not say a complainant must request an ALJ hearing as a prerequisite to judicial review nor that judicial review is not available for non-final agency actions.

I. The Lower Courts Erred In Applying Discretionary Doctrines Of "Finality" And "Exhaustion Of Remedies" To Limit Judicial Review Of Agency Action When The Applicable Statute Plainly Has No Such Requirements, The Doctrines Impede The Statute's Directive For Expeditious "De Novo" Judicial Review, And The Purposes Of The "Exhaustion Of Remedies" And "Finality" Doctrines Are Not Served.

For complainants seeking administrative review under Section 741(b), the statute requires only that a complainant "seek a determination on the merits" from USDA and that "the claim is denied administratively" as prerequisites for judicial review. Notably, Section 741 does not contain the word "final," nor does it require that a complainant seek review from an ALJ prior to seeking "de novo" review from district court. Moreover, Section 741 does not authorize dismissal of an action for failure to exhaust. *Cf. McCarthy*, *supra*, 503 U.S. at p. 150.

Section 741, which retroactively waived ECOA's two year statute of limitation, was enacted as a response to years of racial discrimination at USDA. The agency conducted several studies of its policies and activities with respect to African-American farmers and documented its findings in several reports. In 1997, USDA released a report titled *Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team* (Washington, D.C.; February 1997) ("CRAT Report"). The CRAT Report was a key impetus behind Section 741, as it examined the "painful history" of USDA's

dealings with African-American farmers. It concluded that local credit and loan agencies responsible for administering USDA programs discriminated against African-American farmers, *Id.* at 6, and that USDA's complaints processing system was a "bureaucratic nightmare" that processed complaints slowly if at all while at the same time the agency proceeded with farm foreclosures even where discrimination may have contributed to the farmers' plight. *Id.* at 22-25.

Many complaints of race discrimination related to USDA action or inaction were filed with USDA between 1981 and 1986, but were never processed, investigated, or forwarded to the appropriate agencies for review because of "reorganizations" at USDA in the early 1980s. *See* United States Government Accounting Office Report: U.S. Department of Agriculture: Problems Continue to Hinder the Timely Processing of Discrimination Complaints, GAO-99-38. In 1983 the USDA Office of Civil Rights was disbanded, and USDA stopped responding to discrimination claims. *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999).

"Of 'paramount importance' to any exhaustion inquiry is congressional intent." *McCarthy*, *supra*, 503 U.S. 144 (quoting *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982)). Senator Charles Robb's remarks from the Congressional Record underscore the severity of the discrimination at USDA, the importance of expeditious judicial review, and the necessity of Section 741:

> the investigative unit at USDA's Office of Civil Rights was abolished in 1983. Farmers whose complaints were pending at the time were led to

> believe their complaints were still being investigated, when they were not. Farmers who filed complaints after the abolition of the unit were also led to believe that their complaints would be processed and investigated, despite the fact that the USDA had no resources with which to conduct such investigations. The bottom line is that none of these complaints were ever considered—but none of the farmers were told that was the case.

144 Cong. Rec. S11433 (Sen. Robb).

Senator Robb also highlighted the importance of de novo review by the courts, as provided in Section 741(g), as the courts would not need to rely on the creation of a record by the agency, a factor noted in *McCarthy* which can in some cases militate in favor of exhaustion: "In other words, a court would not be required to give as much deference to USDA's decisions. This is obviously a protection that would have given aggrieved farmers a degree of legal protection that is imminently justified." 144 Cong. Rec. S11434 (Sen. Robb). He also emphasized the importance of the 180 day time limit imposed by Section 741(b)(3) on USDA, the huge "backlog of discrimination complaints" at USDA, and poor record keeping at USDA's Office of Civil Rights: an Office of the Inspector General report "characterized OCR's case files as 'too slovenly to ensure the availability of critical documents.' " *Id.*

All Petitioners sought determinations from USDA on their "Section 741 Complaints," and following lengthy USDA investigations and reviews, received letters denying their claims. Petitioners complaints

were thus "denied administratively." USDA's letter to Petitioner Benoit, attached hereto, is indicative of USDA's denials of Petitioner's complaints. USDA reviewed Benoit's "discrimination complaint" under Section 741 and "determined" that "you were not qualified for the benefits, which you applied for." Under Section 741, Benoit, and the other Petitioners, were entitled to immediate, de novo judicial review.

Section 741 limits the authority of courts to impose additional exhaustion requirements as a prerequisite to judicial review. *See Darby v. Cisneros*, 509 U.S. 137, 145 (1993). The lower courts' use of the discretionary doctrines of "finality" and "administrative exhaustion," which they took from Respondents' regulations, placed a heavier, stricter burden on Petitioners than intended by Congress in the plain language of Section 741. In essence, the lower courts violated a fundamental precept of administrative law by allowing regulations to trump a conflicting statute.

Given the expeditious, de novo review to which Petitioners were entitled following the administrative denials of their Section 741 Complaints, and the lower amount of deference to be afforded USDA's administrative process, the lower courts' use of these doctrines impeded the statutory mandates of Section 741 and thwarted Petitioners from obtaining a "final" judicial decision on their complaints.

II. The Lower Courts' Holding That Petitioners Were Required To Have Sought Further Administrative Remedies Conflicts With This Court's Decision in *McCarthy* When Respondents Took More Than Three And As Many As Five Years To Deny Petitioners' Decades Old Claims, Under A Statute That Mandated Agency Action Within 180 Days "To The Maximum Extent Practicable."

Section 741(b)(3) requires that "to the maximum extent practicable within 180 days after the date a determination of an eligible complaint is sought" USDA shall "issue a written determination and propose a resolution." The lower courts erred by reading the statute in a fashion that would preclude the option of judicial review after the passing of 180 days from the date of filing of a complaint with USDA, when the plain language of the statute and the legislative history clearly show Congress believed expeditious review of paramount importance.

The critical importance of expeditious administrative review is also highlighted in *McCarthy*, where this Court wrote that "federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them." *McCarthy*, *supra*, 503 U.S. at 146 (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-818 (1976)). "Accordingly, this Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise. . . . [A]dministrative remedies need not be pursued if the litigant's interest in immediate judicial review outweigh the government's interest in the

efficiency or autonomy that the exhaustion doctrine is designed to further." *Id.* (citing *West v. Bergland*, 611 F.2d 710, 715 (8th Cir. 1979)).

McCarthy focused extensively on cases where the individual interest weighs heavily against requiring administrative exhaustion, particularly, as here, where there have been significant, unreasonable delays in agency processing of claims. These cases, all cited in *McCarthy*, frequently involve undue prejudice and irreparable injury of long delays in administrative resolution of claims, and/or the "unreasonable or indefinite timeframe for administrative action:" *Gibson v. Berryhill*, 411 U.S. 564, 575, n. 14 (1973) (administrative remedy deemed inadequate "[m]ost often . . . because of delay by the agency"); *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989) ("Administrative remedies that are inadequate need not be exhausted" . . . . "Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures"); *Walker v. Southern R. Co.*, 385 U. S. 196, 198 (1966) (possible delay of 10 years in administrative proceedings makes exhaustion unnecessary); *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 591–592 (1926) (claimant "is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief "); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 773 (1947) ("impending irreparable injury flowing from delay incident to following the prescribed procedure" may contribute to finding that exhaustion is not required).

Petitioners' Section 741 complaints cited significant delays of at least three, and in some cases five years, faced by Petitioners in the processing by USDA of their decades old Section 741 Complaints. Petitioners, as with many other African-American farmers, submitted discrimination complaints to which USDA did not respond, or did not timely respond. These complaints describe the type of "irreparable injury" contemplated in *McCarthy* and the precedent cited in the previous paragraph, thus barring the application of further "administrative exhaustion" and "finality" to Petitioners by the lower courts. The lower courts erroneously applied these discretionary doctrines to Petitioners.

The Court in *McCarthy* also wrote of two additional circumstances when "exhaustion has not been required:" 1) where the challenge is to the adequacy of the agency procedure itself," or 2) where "the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy*, *supra*, 503 U.S. at 148. Petitioner's challenge to USDA's slow processing of Section 741 Complaints, particularly during the period when the USDA Office of Civil Rights was disbanded in the early 1980s, in addition to the substantial evidence of administrative bias in the CRAT Report and other sources cited above, which mirror the treatment of Petitioners by USDA highlighted in their Section 741 Complaints, makes a strong showing under the second factor set out above. This additional factor buttresses Petitioners' arguments that the lower courts erred by applying "administrative exhaustion" to preclude judicial review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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